

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

State of Washington,	)	DIVISION ONE
	)	
Respondent,	)	No. 64946-9-I
	)	
v.	)	
	)	UNPUBLISHED OPINION
Casey Ray Bircher,	)	
	)	
Appellant.	)	FILED: May 17, 2010
_____	)	

Dwyer, C.J. — In order for us to sustain a criminal conviction against a claim of insufficiency of the evidence, where the evidence introduced to the jury included admissions by the defendant, the State must have established the corpus delicti of the charged offense through evidence independent of the defendant's statements. No such independent corroborating evidence was presented in this case. As the State conceded at oral argument, "if that's the case, then the State loses." Court of Appeals oral argument, State v. Bircher, No. 64946-9-I (April 8, 2010) at 13 min., 30 sec., audio recording available at <http://www.courts.wa.gov>. We reverse.

I

"The corpus delicti rule was established to protect a defendant from the possibility of an unjust conviction based upon a false confession alone." State v.

Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). Thus, the corpus delicti rule has traditionally required proof, independent of the defendant's extrajudicial statements, that a crime was committed by *someone*. State v. C.M.C., 110 Wn. App. 285, 288, 40 P.3d 690 (2002) (quoting State v. Flowers, 99 Wn. App. 57, 59-60, 991 P.2d 1206 (2000)).

An oft-stated summary of the rule was as follows:

“The confession of a person charged with the commission of a crime is not sufficient to establish the *corpus delicti*, but if there is independent proof thereof, such confession may then be considered in connection therewith and the *corpus delicti* established by a combination of the independent proof and the confession.

The independent evidence need not be of such a character as would establish the *corpus delicti* beyond a reasonable doubt, or even by a preponderance of the proof. It is sufficient if it *prima facie* establishes the *corpus delicti*.”

State v. Aten, 130 Wn.2d 640, 656, 927 P.2d 210 (1996) (quoting State v. Meyer, 37 Wn.2d 759, 763, 226 P.2d 204 (1951)). “‘Prima facie,’ in this context, means that there is evidence of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be proved.” Vangerpen, 125 Wn.2d at 796.

The original purpose of the rule was to “ensure that an incriminating statement relates to an actual offense” rather than convicting defendants based on false statements. State v. Angulo, 148 Wn. App. 642, 656-57, 200 P.3d 752 (2009). Recently, however, our Supreme Court replaced the traditional understanding of the rule with a more demanding interpretation:

[T]he corpus delicti rule requires the State to present evidence that is independent of the defendant's statement and that corroborates not just *a crime* but *the specific crime* with which the defendant has been charged. The dissent claims the purpose of the rule is only to ensure that "some evidence, *however slight*, supports an inference that *a crime was committed*." . . . But the rule is not so forgiving. The State's evidence must support an inference that *the crime with which the defendant was charged* was committed. This is a much higher standard than the dissent implies. It requires that the evidence support not only the inference that *a crime* was committed but also the inference that *a particular crime* was committed.

State v. Brockob, 159 Wn.2d 311, 329, 150 P.3d 59 (2006). The court further explained that the evidence must independently corroborate, or confirm, "*the crime described in a defendant's inculpatory statement*." Brockob, 159 Wn.2d at 331. Thus, in Brockob, the court reasoned that the State's proffered independent evidence that the defendant therein had stolen large quantities of Sudafed proved only that the defendant intended to steal Sudafed but was not sufficient to support an inference that the defendant intended to manufacture methamphetamine. 159 Wn.2d at 332-33. Accordingly, the court held that the State failed to present independent evidence corroborating Brockob's inculpatory statement that he was stealing the Sudafed for someone else who was going to use it to make methamphetamine. Brockob, 159 Wn.2d at 332.

Division Three of our court, over a strong dissent, subsequently attempted to recharacterize Brockob's expanded explication of the corpus delicti requirement. See Angulo, 148 Wn. App. at 656-57. In Angulo, the court held that although the defendant was charged with first degree rape of a child, rather

than child molestation, the State need not provide independent evidence of the element of penetration to corroborate the defendant's confession to the rape. 148 Wn. App. at 656-59. The majority grounded its reasoning on its assertion that, in recent case law, "[t]he traditional requirement of a 'criminal act' was replaced, unnecessarily in our view, by a requirement that a specific element (penetration) be established." Angulo, 148 Wn. App. at 656. The majority further opined that "[t]he evidentiary *corpus delicti* rule involves not a question of *which* crime was committed, but *whether* one was committed. The rule was not designed as a method of distinguishing one crime from another. Rather, it is a safeguard to ensure that an incriminating statement relates to an actual offense." Angulo, 148 Wn. App. at 656-57. The majority concluded that, "[w]e do not think the purpose of the *corpus delicti* corroboration rule is served by trying to apply it to the elements of the crime rather than focusing on whether a criminal act has been established." Angulo, 148 Wn. App. at 658-59.

The dissenting judge wrote separately to express his concern that the majority ignored the established precedent of Brockob. Angulo, 148 Wn. App. at 661, 666 (Schultheis, C.J, dissenting).

We are unable to follow Angulo in our resolution of this case. Even though Brockob represents a departure from the longstanding view of the corpus delicti rule, we are nonetheless bound by our Supreme Court's holding. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) ("[O]nce this court has decided

an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court . . . ‘unless we wish anarchy to prevail within the [] judicial system, a precedent of this Court must be followed by the lower [] courts . . .’”). Furthermore, our Supreme Court recently confirmed that it meant what it said in Brockob: “[T]he State must still prove every element of the crime charged by evidence independent of the defendant’s statement.” State v. Dow, 168 Wn.2d 243, 254, \_\_\_ P.3d \_\_\_ (2010). “The purpose of the rule is to ensure that other evidence supports the defendant’s statement and satisfies the elements of the crime.” Dow, 168 Wn.2d at 249.

## II

Casey Ray Bircher was charged with attempted trafficking in stolen property in the first degree, a violation of RCW 9A.82.050(1) and RCW 9A.28.020. This charge was based on the fact that police found Bircher in the vicinity of a copper grounding wire attached to a public utility pole that had been cut but not removed from the pole.

At trial, testimony revealed that an anonymous caller had reported that someone in a gray minivan was stealing copper wire near an old weigh station in Lewis County. Bircher and his girlfriend, driving a car matching the description given by the caller, were stopped by a police officer less than a quarter of a mile away from where the copper wire had been very recently cut. Officers recovered two sets of wire cutters from the van. A police officer testified that, during

questioning, Bircher admitted that he had cut the wire but had not been able to take it, and that he had intended to recycle the wire if he had been able to obtain it. Bircher did not object to the officer's testimony regarding Bircher's confession.

At the close of the State's case, Bircher moved to dismiss. The stated basis for the motion was that the State had failed to introduce evidence to corroborate Bircher's statements to the police regarding his intent to traffic in the stolen copper wire. The trial court denied the motion based on the fact that Bircher had confessed that he was going to recycle the copper wire, believing that Bircher's statement could not be ignored.

Bircher was convicted, and he appealed.

### III

Bircher contends that, absent his admissions, the proof at trial was insufficient to support the jury's verdict and that, pursuant to the corpus delicti rule, his admissions may not be considered. To be guilty of the crime of attempted trafficking in stolen property in the first degree, the defendant must have the intention to knowingly "sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person." RCW 9A.82.010(19); RCW 9A.28.020(1) ("A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime."). At trial, the only evidence that Bircher

intended to traffic the copper wire was Bircher's statement that he intended to recycle it. As the State conceded at oral argument, the independent evidence presented at trial does not sufficiently corroborate Bircher's confession, in that it does not "prove every element of the crime charged by evidence independent of [Bircher's] statement."<sup>1</sup> Dow, 168 Wn.2d at 254. Because the corpus delicti of the crime of attempted trafficking in stolen property in the first degree was not established independent of Bircher's statement, the trial court erred in denying Bircher's motion to dismiss.<sup>2</sup> Dow, 168 Wn.2d at 254; Brockob, 159 Wn.2d at 328-29.

Without Bircher's confession, insufficient evidence exists to sustain his conviction. See Brockob, 159 Wn.2d at 352 ("We conclude that independent evidence was insufficient to corroborate Brockob's incriminating statement under

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<sup>1</sup> In a supplemental filing, the State properly asserts that we must consider all evidence presented at trial in resolving this issue. See State v. Dodgen, 81 Wn. App. 487, 915 P.2d 531 (1996). It then points to trial testimony that an "epidemic" of wire theft is present in Lewis County as independent evidence of Bircher's intent. However, the motives of others to commit crimes do not constitute proof of Bircher's intent.

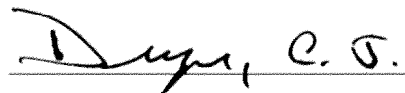
<sup>2</sup> On appeal, Bircher raised the corpus delicti issue through an ineffective assistance of counsel claim, arguing that his attorney was ineffective for failing to object to the admission of Bircher's statements when the corpus delicti had not been established by independent evidence. Bircher did not assign error to the trial court's denial of Bircher's motion to dismiss, which was made at the close of the State's case. Bircher's appellate counsel conceded at oral argument that the ineffective assistance claim fails because the issue was preserved for direct appeal through Bircher's motion to dismiss. See Brockob, 159 Wn.2d at 320 (defense counsel raised the corpus delicti issue in a post-trial, pre-sentencing motion; the Supreme Court did not hold that the issue had been waived). After oral argument, Bircher's appellate counsel moved to file a supplemental brief, assigning error to the trial court's ruling on the motion to dismiss as an additional assignment of error. But it is unnecessary for us to grant the motion. RAP 10.3(g) provides that we will only review a claimed error that "is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." Notwithstanding a party's failure to adequately assign error to each issue on appeal, "this court will reach the merits if the issues are reasonably clear from the brief, the opposing party has not been prejudiced and this court has not been overly inconvenienced." State v. Grimes, 92 Wn. App. 973, 978, 966 P.2d 394 (1998). The corpus delicti issue was thoroughly briefed by both parties in connection with the ineffective assistance of counsel claim and, therefore, we have exercised our discretion to reach the merits.

the corpus delicti rule because possession of Sudafed alone is not sufficient to show intent to manufacture methamphetamine and without Brockob's incriminating statement there was insufficient evidence to support Brockob's conviction."). Sufficient evidence of his intent, absent his statements, was not introduced.

#### IV

Prior to Brockob and Dow, the trial court's decision to deny the motion to dismiss would unquestionably have been affirmed as a correct ruling. There was, after all, evidence admitted that tended to prove that a crime (attempted theft or malicious mischief) had been committed by *someone*. Bircher's confession could then have "filled in the blanks" and provided sufficient evidence to support the jury's verdict of guilt to the particular crime charged (attempted trafficking in stolen property in the first degree). But Brockob and Dow dramatically altered the manner in which the corpus delicti rule must now be applied.

Following the Supreme Court's holding in Brockob, as we must, we reverse.

  
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We concur:

Leach, J.

Meyer, J.P.T.